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United States Supreme Court

OCTOBER TERM, 1936.

No. 138.

KENTUCKY WHIP AND COLLAR COMPANY,
Appellant,

versus

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellee.

APPEAL FROM THE CIRCUIT COURT OF APPEALS,
SIXTH CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF and BRIEF FOR THE STATE OF NEW YORK, APPEARING HEREIN AS AMICUS CURIAE.

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Now Comes the State of New York by its Attorney General, John J. Bennett, Jr., and Henry Epstein, Solicitor General, Counsel, and asks leave to file its brief *amicus curiae* in the above appeal.

The State of New York has at present its own statute (Sec. 69, General Business Law, Ch. 26, Laws 1933) whose enforceability may rest in large measure on the outcome of this appeal.

Date: Aug. 3, 1936.

Yours, etc.,

JOHN J. BENNETT, JR.,
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UNITED STATES SUPREME COURT

OCTOBER TERM, 1936.

No. 138.

KENTUCKY WHIP AND COLLAR COMPANY,
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versus

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellee.

BRIEF FOR THE STATE OF NEW YORK, APPEARING HEREIN AS AMICUS CURIAE.

Statement.

The State of New York begs permission to file this memorandum as a friend of the Court, on the ground that it has a statute (General Business Law, Sec. 69; Laws of 1933, ch. 26) forbidding utterly the sale in the State of New York of any convict-made goods, wares or merchandise, except to the State or any political division thereof, and that if the Federal statute in question is held to be invalid and is not enforced, the State of New York, and other States similarly situated, will suffer serious and irremediable loss to property and rights, and their lawful and constitutional legislative policy will be set at naught.

The theme of this argument is the power of Congress to aid in the enforcement of State laws through its regulatory powers over interstate commerce, under Article I, Section 8, clause 3, of the United States Constitution, providing that "the Congress shall have power . . . to regulate commerce with foreign nations, and among the several States."

The conclusion of this argument is that where State laws are within the sovereign power of the State to enact, no constitutional provision exists to bar Congress from contributing to the support thereof; and specifically, that a Federal statute *(i. e.,* the so-called Ashurst-Sumners Act, July 24, 1935, ch. 412; 49 Stat. Secs. 1-4; U. S. C. A. title 49, Secs. 61-64) violates no constitutional provision in

(a) prohibiting the transportation of convict-made goods, wares and merchandise into any State where they are intended to be received, possessed, sold or used, either in the original package or otherwise, in violation of any law of such State, and

(b) in providing that all packages containing such convict-made goods, wares and merchandise, when shipped or transported in interstate or foreign commerce, shall be plainly marked to show, among other things, the name and location of the penal institution where produced.

The plaintiff herein manufactures horse collars and strap goods in the Kentucky State penitentiary, with convict labor, and has marketed its products throughout the States of the Union. In its bill in equity it alleged that it had delivered to the defendant railroad company certain of its prison-made goods, not marked or labeled as such, for shipment to customers (a) in certain States

which by their laws prohibit the sale of such goods, (b) in certain States which by their laws require prison-made goods to be labeled as such, and (c) in certain States which have no laws on the subject; and that the defendant refused to accept any of the shipments and transport the same, endorsing upon the bills of lading the following: "Shipment refused because prohibited by Act of Congress approved July 24, 1935."

The said Act is the so-called Ashurst-Sumners Act, containing the provisions relating to prison-made goods set forth above.

The case was submitted upon the plaintiff's motion for a perpetual injunction and the defendant's motion to dismiss the bill. The District Court, dismissing the plaintiff's petition but continuing the temporary injunction pending appeal, held in substance that the Federal statute's prohibition of the shipment of prison-made goods was unconstitutional and void, but that the provision requiring the labeling of all convict-made goods in interstate commerce was valid.

In the interest of terseness it may be said at once that we concur in and approve the District Court's decision as to the labeling provision and would support it on more extensive grounds than the learned trial judge has adduced in his opinion. But consideration of constitutional principles and decisions constrains us to protest emphatically against the District Court's reasoning and conclusion upon the prohibition of the interstate carriage of convict-made commodities.

The Circuit Court of Appeals (6th Circuit) has sustained the statute in its entirety as a valid regulation of interstate commerce. The substance of the opinion is that the statute at bar bears the same relation to the

Hawes-Cooper Act (sustained by this court) as the Webb-Kenyon law bore to the Wilson Act (*Clark Distilling Co. v. Western Ry. Co.*, 242 U. S. 311). With the determination of the Circuit Court of Appeals we agree. The judgment should be affirmed.

Historical Background (Statutes and Decisions.)

A very brief summary of the factual background may be helpful. For about 100 years many of the States have been wrestling with the problem of the competition of convict-made goods with the products of free labor. The evil effects of such competition, always notorious, have become calamitous during recent times. In some States, after numerous experiments, means were found to keep the products of a State's own prisons off the open market, but there was no way, without Federal assistance to prevent the influx of convict-made goods from other States.

Action under the Commerce Clause was the evident remedy, and continuously from 1909 to 1929 measures to this end were before the Congress, three times passing the House of Representatives in that period, and culminating in the so-called Hawes-Cooper Act of January 19, 1929 (U. S. C. A., title 49, "Transportation," section 65), in substance taking all goods, wares and merchandise produced by convicts, and transported into a State, out of interstate commerce, and making them subject to State laws, upon their arrival and delivery within a State.

The Hawes-Cooper Act did not become effective until January 19, 1934, and by that time twenty-two States, with population of 75,000,000, had passed legislation prohibiting the sale on the open market of convict-made

goods. The constitutional validity of the Hawes-Cooper Act has been sustained in the New York Supreme Court by Mr. Justice Loughran (now of the New York State Court of Appeals) in *Greenthal v. Bennett;* by the Ohio Court of Appeals, Eighth Appellate District, in *Whitfield v. Ohio;* by the Supreme Court of Wisconsin, in *State v. Whitfield,* 257 N. W. 601; and by the Supreme Court of Ohio, in *Whitfield v. Ohio,* affirmed by this Court, and the United States Supreme Court, in *Alabama v. Arizona* (1934), 291 U. S. 286, upheld the dismissal of plaintiff State's bill against five other States, praying that the laws of those States forbidding sale of convict-made goods be declared invalid. The bill was held to be multifarious, and lacking in equity for failure to show imminent injury and lack of adequate remedy at law.

Still the demoralizing evil has only been scotched, and an illuminating parallel may be noted in that just as the Wilson Act (August 8, 1890; U. S. C. A., title 27, sec. 121), taking intoxicating liquors out of interstate commerce upon their arrival within a State, was found to require as an essential complement the Webb-Kenyon Act (37 Stat. 699; 1915; U. S. C. A., title 27, Sec. 122), and the Reed amendment prohibiting the transportation of liquor into a State where the sale or use thereof was in violation of the State law, before its aim could be effected, so the Hawes-Cooper Act, following virtually verbatim as to prison-made goods the Wilson Act as to liquor, has been reinforced by the measure now under discussion, the Ashurst-Sumners Act, the language of which is substantially identical, as to the transportation of prison-made goods into States where they are to be used in violation of a State law, with that of the Webb-Kenyon Act dealing with intoxicants.

Careful study of congressional enactments, checked with the judicial interpretations, makes it clear that for fifty years or more the exercise by Congress of its regulatory powers under the Commerce Clause has kept pace, step by step, with the development of needs for the use thereof, and has occupied at any given time a field as wide in all dimensions as that of the public welfare. Where public welfare has been best served by measures solely Federal, such measures have been adopted. Where States could act unaided to good purpose, they have been encouraged and their actions approved. Where a combination of State and Federal activity has been indicated as essential or desirable, cooperation has always been forthcoming.

In the exercise of its powers of regulation under the Commerce Clause, Congress is limited by no rule more definite than that any means appropriate to lawful ends may be employed (*McCulloch vs. Maryland,* 4 Wheat. 316, 421). This power does not stop at State lines. It must of necessity be exercised within the territorial jurisdiction of the States. It is the power to regulate, the power to prescribe the rule by which commerce shall be governed. It is vested in Congress, is complete in itself, and may be exercised to its utmost extent, for it has no limitations beyond those found in the Constitution (*Gibbons v. Ogden,* 9 Wheat. 1).

But in such exercise Congress has chosen to use four principal methods, with several combinations thereof, never hesitating at any point to interfere with intrastate transactions when such interference was essential to the fulfillment of an interstate purpose.

These principal methods have been:

1. *The requirement of branding or labeling.*
2. *Prohibition of interstate transportation.*

3. *Divesting commodities of their interstate character upon their arrival and delivery within a State where their sale and/or use was unlawful under State law.*

4. *Prohibition of the interstate transportation of commodities into States where their sale and/or their use would be unlawful under State law.*

The principal combinations of these methods have been:

1. *Both* the requirement of branding or labeling and the prohibition of interstate transportation when not correctly marked.

2. *Both* the requirement of branding or labeling and the divestment of the interstate character of the commodity upon its arrival and delivery within a State where its sale and/or use was unlawful under State law.

3. *Both* the prohibition of interstate transportation and the divestment of interstate character upon arrival within a State where sale and/or use would be unlawful.

Summarizing briefly, the classic example of branding or labeling (par. 1 above) is the Pure Food and Drugs Act of 1906 (U. S. C. A., title 21), covering not only foods and drugs, but tea, filled milk, animals, meats, meat and dairy products and viruses, serums, toxins, antitoxins, etc., with which should be considered the provisions of the Internal Revenue legislation, scattered through title 26 of the U. S. C. A., affecting snuff, cigars, cigarettes, tobacco, oleomargarine, adulterated butter, filled cheese, wines, etc., and those relative to gold and silver articles (15 U. S. C. A., secs. 295 *et seq.)*, intoxicants (18 U. S. C. A., sec. 390), patented articles (35 U. S. C. A., sec. 50), and the like.

The prohibition of interstate transportation (par. 2 above) has found expression with reference to insect pests and their eggs (U. S. C. A., title 7, "Agriculture,"

sec. 141) and in numerous provisions of the Criminal Code in title 18 of U. S. C. A., "Crimes," all the way from the prohibition of the transportation of high explosives (sec. 384), condemned carcasses, lottery tickets, obscene literature (1895, secs. 387, 396), of women for immoral purposes (1910, secs. 397-400), films of prize fights (1912, sec. 405), stolen motor vehicles (1919, sec. 408), down to kidnapped persons (1932, sec. 408-a).

The sterling instance of the divestment of a commodity's interstate protection upon its arrival within a State where its sale and/or use would be unlawful under State enactments (par. 3 above) is the Wilson Act of 1890 (27 U. S. C. A., "Intoxicating Liquors," sec. 121), providing that intoxicants transported into any State for use or sale should upon arrival be subject to any law of the State, enacted in the exercise of its police powers, to the same extent and in the same manner as though the liquor had been produced in such State, and should not be exempt therefrom by reason of being introduced therein in original packages or otherwise. Concomitant therewith is the Hawes-Cooper Act (49 U. S. C. A., "Transportation," sec. 65) making as to convict-made goods the same provisions as those of the Wilson Act in regard to intoxicants, with the omission of the reference to the police powers of a State.

Coming then to paragraph 4 above—the prohibition of interstate transportation of a commodity into a State where the sale and/or use thereof would be unlawful under State enactments—the immediate reference is to the so-called Webb-Kenyon Act (1913, 27 U. S. C. A., sec. 122), which was found necessary to the support of State prohibition laws, since the Supreme Court had held in *Vance v. W. A. Vandercook Co.*, 170 U. S. 438, that it was still possible for individuals in States to order and re-

ceive liquor transported to them. And just as this situation developed with respect to intoxicants, it has been found necessary, as to convict-made goods, to add to the Hawes-Cooper Act, above referred to, which divests such goods of their interstate protection upon their arrival within a State where their sale is unlawful, the Ashurst-Sumners Act (49 U. S. C. A., "Transportation," secs. 60-64), which makes unlawful the interstate transportation of convict-made goods into a State where their sale would be unlawful under State enactments.

Completing the references just made, it may be noted that instances in which Congress has *both* required branding or labeling, and prohibited interstate transportation of goods not properly marked, include dairy products (21 U. S. C. A., sec. 16) meat or meat food products (21 U. S. C. A., sec. 78) and game animals or birds (18 U. S. C. A., sec. 393); and *both* branding or labeling and the divestment of the interstate character of the commodity upon its introduction into a State where its sale would be unlawful have been imposed as to game animals or birds 18 U. S. C. A., sec. 395), and gold or silver articles (15 U. S. C. A., sec. 300); while *both* the prohibition of interstate transportation and the application of State laws upon arrival within a State where sale would be unlawful, as well as proper marking or labeling, are provided for as to insect pests, plants and nursery stock (7 U. S. C. A., secs. 141, 158, 166).

I.

The Ashurst-Sumners Act is a Valid Exercise of the Congressional Power to Regulate Commerce Interstate.

It is, of course, unnecessary to present in detail the foundations of this congressional power to regulate. The

power is plenary, comprehending all commercial intercourse between different States and all the component parts of that intercourse, including the purchase and sale of the commodities transported (Dahnke-Walker Co. v. Bonduvant, 257 U. S. 282), and is not to be denied or thwarted by the commingling of interstate and intrastate operations (Minnesota Rate Cases, 230 U. S. 352). Its existence is obvious, and needs no argument. What matters here is that this power has been exercised in aid of the general welfare, and specifically in cooperation with and support of the attempts of various States to cope with evils confronting them; that such exercise of such power has had judicial approval; and that it has frequently been exercised, with such approval, without regard to whether or not the regulation affected articles or commodities which were harmless in themselves.

This is a point of much significance, inasmuch as the learned Court below has held that no power exists, either Federal or State, to prohibit "the shipment of labeled convict-made goods," since they are "legitimate objects of trade."

The instances of lottery tickets, meat and dairy products, game animals and birds, gold and silver articles, films of prize fights, stolen motor vehicles, and kidnaped persons come at once to mind. It is absurd to attribute to any of these a quality intrinsically harmful, injurious or deleterious. It is the use to which they are put, the effect of their transportation upon the public welfare, that gives rise to the harm which Congress has sought to prevent and which the Court has recognized.

Of late there has been confirmation and acceptance in the Supreme Court of the fine attitude expressed by Mr. Justice Holmes in his dissenting opinion in the Child Labor case *(Hammer v. Dagenhart,* 247 U. S. 251, 281)

when he indicated that evil may be found, not merely in the quality of a thing, but in the use to which it is put; and evil may also be found in a thing which in itself is good, because of the manner of its production. So one with a fine moral sense may prefer not to use a thing, good in itself, for the purpose of discouraging an evil method of production.

And, arguing that Congress might well prohibit the interstate transportation of goods when such interstate transportation is an aid to an evil in the sale, or an evil in the production, Mr. Justice Holmes said, in words fully applicable to the present issue:

> "The act does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the State line they are no longer within their rights. If there were no Constitution and no Congress their power to cross the line would depend upon their neighbors. Under the Constitution such commerce belongs not to the States but to Congress to regulate. It may carry out its views of public policy, whatever indirect effect they may have upon the activities of the States. Instead of being encountered by a prohibitive tariff at her boundaries the State encounters the public policy of the United States, which it is for Congress to express. The public policy of the United States is shaped with a view to the benefit of the Nation as a whole. If, as has been the case within the memory of a man still living, a State should take a different view of the propriety of maintaining a lottery from that which generally prevails, I cannot believe that the fact would require a different decision from that reached in *Champion v. Ames* (188 U. S. 321). Yet in that case it would be said with quite as much force as in that that Congress was attempting to intermeddle with the State's domestic affairs. The national welfare as understood by Congress may re-

quire a different attitude within its sphere from that of some self-seeking State. It seems to me entirely constitutional for Congress to enforce its understanding by all the means at its command."

It is realized that these words were contained in a dissenting opinion. Yet the true force of even the majority's views in *Hammer v. Dagenhart* was not adverse to the contention we offer herein, as will presently be shown, and the essential position of Mr. Justice Holmes in that case has since had thorough vindication in *Brooks v. United States*, 267 U. S. 432, in which he upheld the constitutionality of the Federal statute forbidding the transportation in interstate commerce of an automobile known to have been stolen, the Court saying:

"Congress can certainly regulate interstate commerce to the extent of *forbidding* and punishing *the use of such commerce as an agency* to promote immorality, dishonesty, or *the spread of any evil or harm to the people of other States from the State* of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce." (Italics supplied.)

Yet a motor vehicle, as well as a lottery ticket, is harmless in itself. An even more striking judicial parallel to the present matter is afforded in the legislation affecting the dead bodies of game animals and birds. Far from being obnoxious, evil, or harmful in themselves, these commodities are wholesome articles of food. Yet State game laws regulate possession thereof, and a Federal statute (18 U. S. C. A., §§ 393, 395; the so-called Lacey Act) requires labeling or marking, forbids both shipper and carrier to transport bodies of animals or birds killed in violation of local laws, and, in the language of the Wil-

son Act as to intoxicants and the Hawes-Cooper Act as to convict-made goods, subject such dead animals or birds to the laws of any State upon their arrival in such State.

Congress asked in this matter to validate State attempts to enforce their conservation laws, quite as in the Wilson Act it sought to help the States to enforce their liquor laws, and in the Hawes-Cooper Act and the Ashurst-Sumners Act now under discussion it has designed to aid them in the enforcement of their statutes affecting convict-made goods. The history of the legislation and decisions is illuminating on the present questions.

In *Phelps v. Racey,* 60 N. Y. 10 (1875), the Court of Appeals sustained a State statute making unlawful the possession of game out of season. Congress had not asked, and there was held to be no interference with commerce (citing the *License cases,* 5 How. 504). But, the force of this decision having been weakened by the line of cases represented by *Bowman v. Chicago Railway,* 125 U. S. 507; *Leisy v. Hardin,* 135 U. S. 100, etc., the Court of Appeals held, in *People v. Buffalo Fish Co.,* 164 N. Y. 93 (1900), where the fish in question had been brought in from Canada, that the doctrine of the *License cases,* that a power granted to Congress but not exercised nor forbidden to the States was dormant and could be exercised by the States within their sphere, had been overruled, and that so far as the State law attempted to regulate commerce in articles brought from without the State, it interfered with the congressional power to regulate interstate and foreign commerce and so was invalid.

There was rigorous dissent by Judges Gray, Haight and Martin, and in part by Judge Werner. It may be noted, too, that in upholding the Wilson Act *In re Rahrer,* 140 U. S. 545, the Supreme Court went to the *License*

cases for the distinction between the incidental regulation of interstate commerce admissible under the reserved police power of the States and the power of commercial regulation delegated to Congress.

Following the *Buffalo Fish Co.* decision, Congress enacted the Lacey Act, subjecting dead birds, animals brought into a State to the laws of such State upon arrival therein. Subsequently, but before the effective date of a New York statute of 1902, specifically referring to game from outside the State, the question arose again in *People v. Bootman,* 180 N. Y. 1, when the Court of Appeals held that the Lacey Act did not of itself extend the New York law to the possession of game taken in other States, but ruled that, as to cases arising after the 1902 amendment, the Lacey Act had removed all doubts and had taken the question of interstate commerce out of the picture.

In *Silz v. Hesterberg,* 184 N. Y. 126 (1906), the Court of Appeals held that the Lacey Act directly authorized the exercise by the State of the police power and was a proper enactment validating the State law prohibiting the possession of game out of season, whether taken from within or without the State. It upheld the exclusion of foreign game as a protection of domestic game on the ground that it was the uniform belief of Legislatures and the people that it afforded such protection, noting "that Congress can authorize an exercise of the police power by a State, which without such authority would be an unconstitutional interference with commerce has been expressly decided by the Supreme Court of the United States in *Matter of Rahrer,* 140 U. S. 545."

In the United States Supreme Court, 211 U. S. 31 (1908), the *Hesterberg* case was affirmed. The challenge to the Fourteenth Amendment and the Commerce Clause

was not sustained. The Court held that the Lacey Act was valid as a regulation of interstate commerce, noting that "the New York Court of Appeals further held that the so-called Lacey Act relieved the regulation of the objection in question because of the consent of Congress to the passage of such laws concerning such commerce, interstate and foreign, within the principles upon which the Wilson Act was sustained by this Court;" and further that, independently of the Lacey Act, the State law was a proper exercise of the police power of the State, on the ground that a police measure within the power of the State will not be held bad because it incidentally and remotely affects interstate commerce. The Court reviewed *Plumley v. Massachusetts,* 155 U. S. 461, 473, and *Missouri Kansas Railway v. Haber,* 169 U. S. 613; *Geer v. Connecticut,* 161 U. S. 519. Still further on this point it said:

> "Subject to constitutional limitations, the Legislature of the State is authorized to pass measures for the protection of the people of the State in the exercise of the police power, and is itself the judge of the necessity or expediency of the means adopted."

This principle, we apprehend, supports the contention that *the mere existence of police power in the State to regulate a given subject matter is sufficient to authorize regulatory measures by Congress of the type of the Wilson Act, the Webb-Kenyon Act, the Lacey Act, the Hawes-Cooper Act and the Ashurst-Sumners Act.* That the Webb-Kenyon Act and the Ashurst-Sumners Act add a prohibition of interstate transportation into a State where sale or use is unlawful to the provisions of their respective companion-laws, the Wilson Act and the Hawes-Cooper Act, which relieve commodities of their

interstate nature upon their arrival within a State, is a difference in degree and not in kind, in remedy and not in doctrine. The purpose dominating all these enactments is *to prevent the exclusive power of Congress over interstate commerce from providing a shield behind which to carry on that which the State may validly declare unlawful or injurious.*

That the State's police power does exist in the present circumstances we do not understand to be questioned. If the validity of a State law were alone at issue, it would have to be presumed that the Legislature knew public policy and the needs of the State, that it enacted the law for the promotion of the better order, safety, health, morals, prosperity and general welfare, and judicial inquiry would be limited to determining whether the particular regulation was appropriate to the statutory purpose and was not arbitrary, discriminatory or unreasonable *(Nebbia v. New York,* 291 U. S. 502), while even under this limitation the Legislature, in the words of Mr. Justice Holmes in *Central Lumber Co. v. South Dakota,* 226 U. S. 157, "may direct the laws against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed."

But there is involved primarily the validity of an Act of Congress designed in aid of State enactments aimed at evils which, without the Federal cooperation, cannot be coped with.

If the State and Congress, working to the same end, have the power to cooperate so as to enforce fish and game laws, the State declaring its policy through its own statutes, and Congress removing by Federal law the

interferences which might arise through the implications of the Commerce Clause, how much greater must be the power to protect free labor from unjust and ruinous competition.

There is nothing inherently bad or dangerous to health, morals or safety in a bird, or deer, or any other animal merely because it is shot in another State. It may be in season in the State where it is taken and out of season in the State to which it is transported. A fish caught in the waters of one State or country is no worse for eating purposes than one caught in another jurisdiction. But can it be that a State has the power to conserve its food supply, and Congress has the power to waive the restrictions of interstate commerce in aid of that purpose, while they are without the power to protect their people in their prosperity and their right to work in order that they may obtain and use that food supply?

Is it not a function of government to preserve the freedom of labor? "There is no more important concern", it has said, "than to safeguard the freedom of labor, upon which alone can enduring prosperity be based." *(Bailey v. Alabama,* 219 U. S. 219.) There is no fact more obvious than that from a social and economic standpoint the sale in the open market of goods made by prison labor is detrimental to the prosperity and welfare of the State and destructive of the peace and good order of the people. The enormous extent to which this demoralizing traffic has invaded free markets and has taken down wage rates and living standards is a matter of common knowledge. We feel that judicial notice will surely be taken of the notorious facts, and moreover of the established national policy against these conditions, reflected in numerous appropriation bills and

tariff acts, in the Reconstruction Finance Corporation Act, the National Industrial Recovery Act, and the State laws governing more than 75,000,000 of our people.

From what has been cited herein it appears that the constitutional argument for the validity of the Wilson Act, the Lacey Act and the Hawes-Cooper Act, all of which removed certain commodities from the status of interstate commerce upon their arrival within a State, has turned upon the Supreme Court's reasoning in *In re Rahrer,* 140 U. S. 545, in which that Court upheld the Wilson Act, holding that the act was not an attempt to delegate the power to regulate commerce, or to exercise any power reserved to the States, or to grant a power not possessed by the States, or to adopt State laws, but that Congress "has taken its own course and made its own regulation, applying to those subjects of interstate commerce one common rule, whose uniformity is not affected by variations in State laws in dealing with such property." And further:

> "The framers of the Constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject matter specifically committed to its charge. * * * Congress did not use terms of permission to the State to act; but simply removed an impediment to the enforcement of the State laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the State not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction."

To this view of the Wilson Act, which it seems clear could be applied with but slight change in wording and no alteration of thought to a Federal statute prohibiting interstate commerce from the point of inception, instead

of removing articles from such commerce upon arrival at their destination, should be added the fact that when the Webb-Kenyon Act, which did take that one step further and did make that prohibition of the interstate transportation of a commodity from the point of inception, came before the Supreme Court in *Clark Distilling Co. v. Western Maryland Railroad Co.*, 242 U. S. 311, the Court followed right along, and sustained the Webb-Kenyon Act, on the specific ground that such a conclusion was the *express* result of the Rahrer case, saying:

> "As we have already pointed out, the very regulation made by Congress in enacting the Wilson law to minimize the evil resulting from violating prohibition of State law by sending liquor through interstate commerce into a State, and selling it in violation of such law, was to divest such shipments of their interstate commerce character and to strip them of the right to be sold in the original package free from State authority which otherwise would have obtained. And that Congress had the right to enact this legislation making existing and future State prohibitions applicable was the express result of the decided cases to which we have referred, beginning with *Re Rahrer*, 140 U. S. 545."

We are aware that in one or two decisions affecting interstate transportation the Supreme Court has used words which, it may be claimed, would limit the scope of the power of Congress. Thus, in the *Clark Distilling Co.* case, fears having been expressed by counsel that to sustain the Webb-Kenyon Act would open the door to unpredictable abuses, the Court said that the "exceptional nature" of the subject there regulated *(i. e.*, the transportation of intoxicants into States which prohibited their sale or use) "affords no ground for any fear that such power may be constitutionally extended to things

which it may not, consistently with the Constitution, embrace." And in the *Child Labor* case *(Hammer v. Dagenhart,* 247 U. S. 251, 271) the Court, referring to the liquor regulation and to the Mann Act *(Caminetti v. United States,* 242 U. S. 470) said: "In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended."

No claim that Congress lacks power to deal with interstate transportation of convict-made goods may be fairly based upon such utterances.

(a) It was not intoxicating liquors which were referred to in the *Clark Distilling* case as of a nature so exceptional as to warrant an exceptional power. On the contrary the "exceptional" element was the *transportation* of intoxicants into States *which prohibited their sale or use.* Certainly, though convict-made goods themselves may be intrinsically harmless, or even useful, their transportation into States which forbid their sale or use is an evil of a grossly exceptional sort, with which Congress, on the basis of this decision, has ample power to deal by forbidding such transportation.

The labor which produces convict-made goods is not free labor, and there are in such labor no inherent rights of men which are subject to the normal protection of the Constitution. The provisions against deprivation of life, liberty, or property, found in the Fifth and Fourteenth Amendments, do not preserve for the convict any liberty to contract, or any right of property in his labor or the products of his labor, and other persons cannot contract with the convict for his labor and thereby acquire rights

of property. We have in the Constitution a direct provision against involuntary servitude. We have a public policy against anything in the nature of slave labor. That being so, it is clearly within the province of Congress to protect commerce from any evil that might come into commerce through the use of the products of labor produced under involuntary servitude, not necessarily because the article itself is a dangerous thing, but because the use of the article necessarily aids in the carrying out of an evil thing, the doing of an evil act, in this instance the crushing of free labor in industry.

In other words, it is just as proper for Congress to protect free labor against the interstate transportation of convict-made goods as it is to protect free labor against the flooding in from abroad of the products of slave labor, and Congress has in fact, as we have already shown, repeatedly passed laws in pursuance of this principle.

Just as clearly, if the labor of convicts is so utilized as to destroy the property of free men in their labor, or the property of others in the products of free labor, it can hardly be questioned that prohibitions upon the use of convict labor could be imposed by any governmental power established and functioning to preserve the freedom of labor, and that Congress may, if it chooses, protect interstate commerce in the products of free labor from the demoralizing influence of the competitive products of convict labor, and may utilize prohibition as a means of regulating the development of interstate commerce in the products of what Congress might regard as an evil business, that is, the sale of convict-made goods.

(b) When the Court noted in *Hammer v. Dagenhart* certain instances in which "the use of interstate transportation was necessary to the accomplishment of harmful results," it used language from which the inference might reasonably be drawn, not that the article itself

must be harmful, but that where the *results* of its transportation are harmful the prohibition of such transportation can be sustained.

The Court did say of the products of child labor that they were "of themselves harmless," that they were legitimate subjects of commerce. But as to articles the use of which calls for regulation, its conclusion was no more than that the authority to prohibit is but the exertion of the regulating power.

That the *Child Labor* case is altogether distinguishable from the present matter, but, so far as it is at all pertinent, is in favor of the constitutionality of the Ashurst-Sumner Act, is made clear by a brief examination of its bases. In that case the Supreme Court held invalid an Act of Congress (39 Stat. at L. 675, Ch. 432) which, as it said

> "does not regulate transportation among the States, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States. * * * The Act permits them (such goods) to be falsely shipped after 30 days from the time of their removal from the factory. * * * Over interstate transportation or its incidents, the regulatory power of Congress is ample, but the production of articles intended for interstate commerce is a matter of local regulations. * * * To sustain this statute would not be, in our judgment, a recognition of the lawful exertion of Federal authority over interstate commerce."

Clearly this Act, with its 30 day provision, was an attempt to regulate manufacture. It bore no relation to the laws of any States from which or into which such products were to be shipped. No State had a law prohibiting the sale of such goods on the open market. It prohibited the sale of such goods in all States, regardless of State regulation thereof, and thus usurped a State

function. It set up in itself the standard of labor, thus usurping a purely local State power.

The Ashurst-Sumners Act makes no attempt to regulate production by prison labor. It permits a State to produce in its prisons whatever commodities it may choose, in any amount and under any conditions. It does not interfere with the disposal of such commodities to persons within that State or to persons within any other State which permits the sale on the open market, and use, of convict-made commodities. It merely says to a State and to the handlers of prison-made goods that they may not use the facilities of interstate commerce to transport articles into States where they are to be sold in violation of the law of the State into which they are shipped. It would scarcely be urged by anyone that the Webb-Kenyon Act was an attempt by Congress to regulate internal manufacturing, and it cannot be said that this Act, which is in almost identical language, has such effect.

The Ashurst-Sumners Act, in brief, supports the authority of the States over matters purely local; it does not restrain the States in the regulation of their own industries, but assists those which seek to protect the general welfare of their people by prohibiting the sale of prison-made goods, to ward off the influx in interstate commerce of such goods from other States which do not see fit so to protect their people and regulate their prisons. The Act accordingly removes an impediment in the enforcement of State laws, just as did the Wilson Act and the Webb-Kenyon Act and the Lacey Act and the Hawes-Cooper Act.

A few words may dispose of the *Child Labor Tax* case, 259 U. S. 20, which the Supreme Court held could not be distinguished from *Hammer v. Dagenhart;* also of the question of invalid delegation of power by Congress,

which point was raised *In re Rahrer* and *Silz v. Hesterberg, supra,* and decided adversely to the petitioner's contention herein. It may also be noted briefly that, even if there are some subjects which are in their nature national, or admit only of one uniform system of regulation, and so permit only of exclusive control by Congress, convict-made goods are not within that class.

In conclusion, we submit, upon all the foregoing, that, as a State may undoubtedly, for the purpose of guarding the best interests of the commonwealth and the security and welfare of its inhabitants, forbid all sales of prison-made goods within its limits, so the Congress, to protect the commerce which concerns all the States, not usurping the State's police powers but enabling them to be effectual, may prohibit the carrying into a State of objects of commerce which create the mischiefs sought to be remedied by the declared public policy of the State.

It would be hard law, indeed, and no case has ever yet so held, if Congress may pass acts prohibiting the interstate transportation of harmless articles of commerce, for the protection of the police power of the States in legislating upon their natural resources, and yet is deprived of the authority to protect the police power of a State when it has legislated to conserve human resources and the welfare of human beings.

The Act should be sustained in its Entirety.

Respectfully submitted,

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APPENDIX

SUPREME COURT—ALBANY COUNTY.

HARRY GREENTHAL,

Plaintiff,

against

JOHN J. BENNETT, JR., as Attorney General of the State of New York,

Defendant.

ULSTER SPECIAL TERM

(December, 1933)

Action to restrain enforcement of the Hawes-Cooper bill (Act of January 1929, ch. 79, 45 Stat. 1084, 49 U. S. C. A. 65) and New York Business Law 69 (L. 1933, ch. 26).

Mortimer Fishel, for the plaintiff.

Henry Epstein, Solicitor General for defendant.

MEMORANDUM

(LOUGHRAN, *J.*)

The Act of Congress is assailed as an attempt (1) to delegate to the states the exclusive federal power over interstate commerce; or (2) to control production of innocuous goods so as to equalize competition in industry. I am of opinion that the basis to neither objection inheres in the act. Congress may affirmatively assent to an exercise of state police power otherwise valid, although interstate commerce is thereby limited. *(In re Rahrer,* 140 U. S. 545.) Control of the disposition of prison goods in

one state (if a legitimate end of the police power there) is not essentially the regulation of their production in another state (cf. *Hammer v. Dagenhart*, 247 U. S. 251).

The New York statute is challenged as obnoxious to the due process clauses. That challenge, I think, is invalid. It is the policy of the state, as declared by the statute, "to protect free labor from the unjust competition of convict labor,"—a policy persistently asserted for more than a generation (L. 1894, ch. 696; L. 1928, ch. 805). It is sound to keep convicts at work. The products of free labor must be marketed at a profit. If there be conflict between these objectives, the choice was for the legislature (*Barbier v. Connolly*, 113 U. S. 27; *Noble State Bank v. Haskell*, 219 *id.* 104; *Central Lumber Co. v. South Dakota*, 226 *id.* 157, 160). The cases cited by plaintiff (*People v. Hawkins*, 157 N. Y. 1; *People v. Raymes*, 136 App. Div. 417; aff'd 198 N. Y. 539, 662) are not here controlling. In the *Hawkins* case only one member of the court took the position that the legislation there reviewed amounted to a denial of due process. Final determination of the *Raymes* case also turned on the commerce clause (198 N. Y. 622).

Judgment for the defendant.

Dated January 5, 1934.